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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. GENARO BRANDELL PATTERSON, Defendant and Appellant.	C075287 (Super. Ct. No. 12F07845)

A jury convicted defendant Genaro Brandell Patterson of three counts of pimping (Pen. Code, § 266h, subd. (a)),[1] and single counts of false imprisonment (§ 236), assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)), second degree robbery (§ 211), and dissuading a witness (§ 136.1, subd. (a)(1)).

[1] Undesignated statutory references are to the Penal Code.

Sentenced to a state prison term of 17 years four months, defendant appeals.

He contends the trial court committed prejudicial error by refusing a defense request for an instruction that would limit certain text messages to be considered only for nonhearsay purposes (i.e., not for the truth of the matter stated). He also contends the trial court committed prejudicial error by urging the prosecutor to change his theory of the case on the count of dissuading a witness. Finally, he contends it was a federal constitutional error to deny retained defense counsel's motion to withdraw from the case. We find no prejudicial error. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On the morning of November 23, 2012, defendant was driving L.C., a woman in her early twenties, and her toddler son from Elk Grove to Richmond. Enroute, a verbal and physical fight broke out in the car between L.C. and M.Y., another woman in her early twenties, who was riding in the front passenger seat.[2] L.C. called 911 and frantically pleaded for help but was unable to report her location. The line remained open throughout the conflict. Eventually, defendant stopped the car at his niece's home in Sacramento, pulled L.C. out of the car, threw her cell phone over a brick fence, and beat her. L.C. escaped, leaving her son behind. During the investigation that followed, police discovered evidence showing that defendant was a pimp and that L.C. and M.Y., along with another woman, A.R., were prostitutes working for him.

DISCUSSION

I. The Trial Court Did Not Commit Prejudicial Error by Refusing the Request for a Jury Instruction Limiting the Use of the Text Messages

A primary piece of evidence showing that defendant was A.R.'s pimp (count 2) was an array of text messages downloaded from defendant's phone and two phones

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[2] L.C. and her son were sitting in the back seat.

belonging to A.R.[3] These messages included "conversations" between A.R. and defendant—of a pimp/prostitute nature and of a personal nature—and between A.R. and alleged clients.

Defendant contends the trial court should have instructed the jury, as defendant requested, that none of the text messages (which primarily involve A.R.) could be used to prove the truth of the matter asserted.

Based on Evidence Code section 355 (admissibility of evidence for a limited purpose), defendant, on appeal, states the trial court should have instructed the jury as follows, pursuant to defendant's request, regarding the challenged text messages:

"The People presented evidence that [A.R.] made statements in text messages and otherwise. If you believe such evidence, you may, but are not required to, consider such statements for the following limited purposes only:

"(1) Providing context from which to understand [defendant's] replies to [A.R.], if any; and

"(2) Determining whether the statements are part of the practice of prostitution.

"These statements may not be considered by you as evidence of the truth of the facts they disclose." (Citing CALCRIM No. 375; *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1434.)

As the proposed instruction appears to concede, in its item (2), the conversations between A.R. and defendant of a pimp/prostitute nature—which would be considered "verbal acts" or "operative facts" of prostitution and pimping—are not hearsay and are

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[3] The only prejudice alleged by defendant on appeal is in regards to the messages that provide direct evidence as to prostitution or pimping involving A.R. While defendant indicates that these make up less than seven of the 43 pages of text messages admitted into evidence, he does not suggest any prejudice in the remainder.

admissible on this basis. (*People v. Dell* (1991) 232 Cal.App.3d 248, 258, 262.) The hearsay rule protects against the unreliability of unexamined out-of-court statements for the truth of the matter stated. But if the truth of the matter stated is irrelevant to the case (e.g., the specific costs of the various prostitution services being negotiated in this case; the number of clients serviced), there is no reason to exclude such statements as hearsay. (*Ibid.*)

Initially, defendant, on appeal, fails to identify, or provide an example of, any specific text messages he believes the jury could have used erroneously to prove the matter asserted, so as to justify the proposed instruction. This leaves us in the unenviable position of being asked to parse through hundreds of text messages seeking the ones that may erroneously have been labeled nonhearsay. We decline the invitation to engage in this fishing expedition; it is defendant's job on appeal to cast that net. (*People v. Green* (1979) 95 Cal.App.3d 991, 1001 [on appeal, error must be *affirmatively* shown].) In any event, at one point in his opening brief defendant even concedes that, "[*t*]*aken as a group*, the [text] messages showed the conduct of an ongoing prostitution business." (Italics added.)

Furthermore, the various permissible and impermissible uses of the evidence, as stated by the proposed instruction, were likely to cause confusion—the distinctions drawn in the instruction were too small to be of any real use to the jury.

Finally, the proposed instruction in effect would have informed the jury of the legal basis on which the trial court ruled the evidence admissible, rather than limit the purpose of such evidence. Decisions of evidentiary admissibility are questions of law, and the trial court is under no obligation to instruct the jury as to how questions of law were decided. (See Evid. Code, § 402 subd. (b); *People v. Ramirez* (1880) 56 Cal. 533, 536-537.)

We find the trial court did not err—or, to the extent it did err in admitting personal conversations between defendant and A.R., did not prejudicially err—in refusing the defense request for an instruction limiting the use of the text messages as evidence.

II. The Trial Court Did Not Commit Prejudicial Error by Urging the Prosecutor to Change His Theory on the Dissuading Offense

During the instruction conference, the prosecution requested jury instructions related to a crime that defendant was not charged with—dissuading the reporting of a crime. (§ 136.1, subd. (b)(1); CALCRIM No. 2622 ("Alternative 1B").) The trial court corrected the prosecution, pointing out that defendant was actually charged with dissuading a witness from testifying, and included jury instructions related to that crime. (§ 136.1, subd. (a)(1); CALCRIM No. 2622 ("Alternative 1A").) The trial court then persuaded the prosecution to continue with this charge and noted the evidence the prosecution had elicited at trial to prove that charge.

Defendant contends this interchange between the trial court and the prosecution amounted to a breach of the trial court's impartiality and, consequently, prejudicial error.

Apparently, the prosecution misunderstood the dissuading charge and prepared the case that defendant's action of throwing away L.C.'s cell phone during the November 23 altercation was tantamount to dissuading the reporting of a crime. (§ 136.1, subd. (b)(1).) However, defendant was charged with dissuading a witness from testifying (§ 136.1, subd. (a)(1)) because he arranged, in a jailhouse conversation with L.C. that was recorded and presented to the jury, for L.C. to be out of town at the time of trial. The trial court corrected the prosecution during the instructional conference after the prosecution requested the incorrect jury instructions. The trial court said: "I'm not sure why you made that election, [Prosecutor]. . . . [S]o you're saying that the tossing of this—that you're relying on the tossing of the phone for this crime? [¶] Isn't the—isn't the jail tape equally as clear when he—doesn't he say to [L.C.], you need to go to Arizona for a

week?" The prosecutor consented to the instructions offered by the trial court and argued for this dissuading theory in his closing argument. The prosecutor had not discussed this theory in his opening statement.

A. *The Trial Court Did Not Err in Noting the Link Between the Prosecution's Evidence and the Dissuading Charge*

The trial court has the responsibility to properly instruct on the elements of the crime charged. (*People v. Edwards* (1985) 39 Cal.3d 107, 117.) Since defendant was charged with violating section 136.1, subd. (a)(1) (dissuading a witness from testifying), rather than section 136.1, subd. (b)(1) (dissuading the reporting of a crime), the trial court was correct in including the jury instruction despite the prosecution's confusion.

Further, "it has been held that it is the duty of a trial judge to see that a case is not defeated by 'mere inadvertence' [citation], or by 'want of attention' [citation], and 'to call attention to omissions in the evidence or defects in the pleadings' which are likely to result in a decision other than on the merits." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457.)

Here, while the trial court may have gone beyond merely including the correct instructions, the correction fell within this judicial role. During the instruction conference, the trial court noted for the prosecutor how the evidence admitted during the prosecution's case-in-chief came within the charge alleged against defendant. The prosecutor *laid out the dots*; the trial court simply *connected those dots* for him in the manner allowed by the *St. Andrew* decision.

B. *Even Assuming Error Occurred, It Was Not Prejudicial*

Even if we assume the trial court erred, defendant cannot show he was harmed—i.e., defendant cannot show it is reasonably probable he would have fared better had the error not occurred. (*People v. Watson* (1956) 46 Cal.2d. 818, 836.) Here, the jury had before it the charge (dissuading a witness from testifying) and the evidence supporting that charge (defendant sending L.C. to Arizona).

III. The Trial Court Did Not Commit Prejudicial Error by Denying the Request for Withdrawal of Retained Counsel

After the verdict was returned, but before sentencing, defense counsel, who had been retained, moved to withdraw. Prompting this motion was defendant's request to review the trial transcript to determine if he should file a motion for new trial based on incompetence of counsel. Defense counsel contended it would be a conflict of interest for him to file a new trial motion claiming that he was ineffective at trial. Based on its own observation that defense counsel was "a competent, vigorous advocate on [defendant]'s behalf," the trial court denied defense counsel's withdrawal motion.

Defendant contends the trial court erred by applying the *Marsden* standard[4] for the substitution of appointed counsel, because either it was the incorrect standard for retained counsel or the court failed to inquire sufficiently into the claim of ineffective counsel before refusing to allow defense counsel to withdraw.

A. *The Trial Court Erred by Applying the* Marsden *Standard to Retained Counsel*

"While we do require an *indigent* criminal defendant who is seeking to substitute one *appointed* attorney for another to demonstrate either that the first appointed attorney is providing inadequate representation [citations], or that he and the attorney are embroiled in irreconcilable conflict [citation], we have never required a *nonindigent* criminal defendant to make such a showing in order to discharge his *retained* counsel." (*People v. Ortiz* (1990) 51 Cal.3d 975, 984.) The trial court may deny discharge of retained counsel only when the discharge will result in significant prejudice to the defendant or when the discharge request is not timely, i.e., it will disrupt the orderly processes of justice. (*Id.* at p. 983.)

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[4] *People v. Marsden* (1970) 2 Cal.3d 118.

Here, the retained counsel standard applies. Nothing in the record suggests either that the withdrawal would prejudice defendant or that it would disrupt the orderly processes of justice. The trial court should have allowed defense counsel to withdraw.

B. *The Trial Court Error Was Not Prejudicial*

A motion for new trial alleging ineffective assistance of counsel requires the trial court to inquire into the claim. (See *People v. Reed* (2010) 183 Cal.App.4th 1137, 1144.)

Here, defendant, representing himself (at the time of retained counsel's withdrawal motion), moved for a new trial based on his mental incompetence to stand trial (defendant also had a new counsel ready to go at this point). Defendant's claim of ineffective assistance of counsel was intertwined in his new trial motion. Specifically, defendant contended the basis for his ineffective assistance of counsel claim was that defendant was "hearing voices" during court proceedings, causing him to be unable to communicate with his attorney.

The trial court reviewed and denied this motion for a new trial. Despite defendant's claim to the contrary, the trial court had already found defendant competent to stand trial. Following trial, but before sentencing, retained counsel had moved successfully to continue the case in order to assess defendant's mental capacity pursuant to section 1368 (duty of court when mental competence of accused questioned). Proceedings were suspended for more than two months. Defendant's psychological examination concluded he was malingering and feigning symptoms both during the time of the examination and during trial. After reviewing the psychologist's report, the trial court found defendant was competent throughout the proceeding and was competent to proceed.

Furthermore, the trial court noted defendant's malingering was particularly egregious, stating, "I have never had a doctor with such certainty declare over and over again that it is patently obvious that [defendant] suffers absolutely no mental incapacity

on any ground. On the contrary, he is obviously and repeatedly faking his alleged mental problems." Additionally, shortly following the trial court's discussion regarding these findings, defendant was given the chance to speak, and stated, "[I] should be allowed to do trial all over again because for the simple fact that I was never evaluated to see if I was competent or incompetent, and I just wanted to put that on the record." Defendant's absurd claim that he was denied this evaluation immediately after the court discussed the results of the evaluation further exposes defendant's intention to drag out this case and frustrate the processes of justice.

Thus, the trial court, in effect, inquired into the basis of defendant's motion for new trial for ineffective assistance of counsel (retained counsel's alleged ineffectiveness regarding defendant's mental incompetence to stand trial), and properly found no such ineffective assistance. Therefore, the trial court's error in denying retained counsel's motion to withdraw—a motion that would allow defendant to assert such counsel's ineffectiveness regarding defendant's mental incompetency—did not prejudice defendant.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

HULL, J.